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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6029

ANTHONY LaROCCA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

PETITIONER'S CONVICTION AND SENTENCE UNDER COUNT 19 MUST BE VACATED.

Almost a decade ago the government took the position that the use of a firearm in assaulting a federal officer should be prosecuted pursuant to the specific "enhanced penalty" provision of 18 U.S.C. §111, rather than the general one in

18 U.S.C. §924(c). *See* PET. BR. at 10, 12 & n.12, 17.[1] The government now labors long and hard to disavow this view in an effort to sustain petitioner LaRocca's Section 924(c) conviction and sentence under Count 19. But when all is said and done, the government's present position cannot be reconciled with *Simpson v. United States,* 435 U.S. 6 (1978), in which this Court specifically endorsed the government's original views on the restricted scope of Section 924(c). *Id.* at 16. Indeed, as we discuss below, the government's brief in this case is largely a rehash of arguments that were offered, and rejected, in *Simpson.*

There is one new argument of note advanced by the government — an asserted gloss on Representative Poff's explanation of the limited reach of Section 924(c). However, this piece of legerdemain cannot mask the central fact that Congress considered it both unnecessary and inappropriate to extend Section 924(c) to Section 111 violations.

A. Simpson v. United States Is Depositive Of This Case.

The government maintains that nothing in *Simpson* limits its discretion to prosecute the use of a firearm in assaulting a federal officer pursuant to Section 924(c). In the government's view, *Simpson* merely bars simultaneous sentencing under both Section 924(c) and the second paragraph of Section 111. U.S. BR. at 37-39.

A moment's reflection betrays the flaw in this argument.

[1]"PET. BR." refers to petitioner LaRocca's opening brief filed December 1979, while "U.S. BR." refers to the brief filed by the United States in opposition thereto in January 1980. All references to the position in this case of the United States are to the latter brief, unless otherwise noted.

Simpson does forbid the imposition of doubly enhanced sentences, but the Court reached this result precisely because it concluded, as Simpson argued, that no conviction can be obtained at all under Section 924(c) when the specific enhanced penalty provision of another section of Title 18 applies. *See* PET. BR. at 9 & n.8. The government carefully passes over this conclusion in its description of *Simpson.* Yet it is set out *in haec verbae* at various points in the Court's opinion. *See* PET. BR. at 9-11.

Even more important is the rationale of the *Simpson* decision. The Court's analysis of the legislative history of Section 924(c), for example, logically forecloses the government's argument. The Court found this history pertinent not merely because it indicated a congressional aversion to cumulative sentences, but because it was "clearly probative of a legislative judgment that the purpose of §924(c) is *already served* [and the provision, therefore, should not apply] *whenever* the substantive federal offense provides enhanced punishment for use of a dangerous weapon." 435 U.S. at 13 (emphasis added).[2]

The Court also relied in *Simpson* on "the interpretative preference for specific criminal statutes over general criminal statutes." 435 U.S. at 16. The very invocation of this principle leaves no room for the government's reading of *Simpson.* Because this principle "gives precedence to the terms of the more specific statute," *id.* at 15, it was — and could only have been — invoked in the decision to support the conclusion that the specific enhanced penalty provisions

[2]With admirable candor the government acknowledged in its brief in response to our petition for a writ of certiorari (at 7) that this language "lends considerable credence to petitioners' contention that Section 111 violations can never supply the predicate for a conviction under Section 924(c)(1) . . . ."

of Title 18 govern *to the exclusion of Section 924(c).*[3]

In sum, *Simpson held* that Section 924(c) has no application where the predicate felony statute already provides an enhanced penalty for the use of a weapon. What the government seeks in this case, then, is not the answer to any novel issue, but rather reconsideration of a decision already handed down. If the doctrine of *stare decisis* means anything, the Court should reject the government's position out of hand. *See* PET. BR. at 8 & n.7. Not only is Congress free to overrule or alter *Simpson* in any way that it sees fit, but, in fact, legislation is presently pending addressing the very issues raised here. *See* note 14, *infra.* The government's arguments, accordingly, would be more appropriately directed to Congress than to this Court.

B. The Pertinent Tools Of Statutory Construction Dictate The Inapplicability Of Section 924(c) To Armed Assault.

Even if *Simpson* were not directly dispositive of this case, the "tools of statutory construction" relied on there (435 U.S. at 12) point unmistakably to the conclusion that Count 19 here must be vacated. *See* PET. BR at 11-21. The government's contrary arguments do not withstand analysis.[4]

[3]Although the government now seems to think that *Simpson's* reliance on this rule of construction can be reconciled with its theory of an election of offenses (*see* U.S. BR. at 43 & n.22), this principle was the foundation for the government's original position that Section 924(c) does not embrace *any* Section 111 violations. *See* 435 U.S. at 16.

[4]Emphasizing that Section 924(c) applies to the use of a firearm to commit "any" felony, the government suggests (at 17-19) that the language of this provision makes reliance on legislative history and other similar interpretative tools suspect. Yet the government made essentially

(continued)

1. The legislative history demonstrates Congress's intent to exclude Section 111 violations from the scope of Section 924(c).

This case bears little resemblance to *United States v. Batchelder,* 442 U.S. 114 (1979), on which the government relies so heavily to support its theory of an election of offenses. *Batchelder* involved Sections 922(h) and 924(a) of Title 18, both of which prohibit convicted felons from receiving firearms. The Court held that these provisions constitute "two independent gun control statutes, each fully enforceable on its own terms . . .," despite differences in their sentencing provisions. *Id.* at 119. The Court reached this result on the basis of authoritative statements in both houses "evinc[ing] Congress' *clear* understanding that the two Titles would be applied independently." *Id.* at 121 (emphasis added).

Here there is no such "understanding," as *Simpson* itself makes clear. *See* 435 U.S. at 13-14. On the contrary, the legislative history of the Gun Control Act of 1968 contains the unequivocal statement by Representative Poff that Section 924(c) is not intended to apply to Section 111, since that provision "already define[s] the penalties for the use of a firearm in assaulting officials . . . ." 114 Cong. Rec. 22232

(footnote continued from preceding page)

the same argument in *Simpson. See* Br. for the United States, Nos. 76-5761 and 76-5796, filed August 5, 1977, at 11-12. The argument was rejected then, and should be rejected now.

It is well-established that "[w]hen aid to construction of the meaning of words, as used in [a] statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " *Train v. Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 10 (1976), quoting *United States v. American Trucking Assns.,* 310 U.S. 534, 543-44 (1940). Here the pertinent aids to construction belie any facile interpretation of Section 924(c) based on its reference to "any" felony.

(1968). This statement by the sponsor of Section 924(c) upon its introduction was expressly made "[f]or the sake of legislative history," *id.*, and is the most authoritative explanation of the scope of the provision. *See* PET. BR. at 11 n.11.[5]

In addition, in enacting Representative Poff's proposal, Congress rejected an amendment offered by Senator Dominick that "would have permitted the imposition of an enhanced sentence for the use of a firearm in the commission of any federal crime, even where allowance was already made in the provisions of the substantive offense for augmented punishment where a dangerous weapon is used." 435 U.S. at 14.[6] This legislative record shows that Congress intended the enhanced penalty paragraph of Section 111 to apply in place of Section 924(c), *see* PET. BR. at 11-13, and sets this case entirely apart from *Batchelder.*

The government attempts to overcome this legislative history by an extensive recitation of other events during the

[5]The government suggests (at 31) that Representative Poff was speaking only to whether Section 924(c) permits doubly enhanced sentences and not to whether it can be invoked in place of existing enhancement provisions. This is absurd. Representative Poff plainly stated that his proposal would not apply to Section 111 inasmuch as that statute already provided for an enhanced penalty in case a firearm was used.

[6]Contrary to the government's suggestion (at 37 n.18), the rejection of the Dominick amendment signifies more than a congressional determination to punish the use of a firearm even in the commission of nonviolent crimes and to avoid cumulative sentencing. The Dominick amendment would have conferred on the government the very authority sought in this case — to prosecute an armed assault under Section 924(c). Although a number of considerations may have animated the Congress in choosing the Poff over the Dominick proposal, that does not diminish the significance of the fact that, according to their respective sponsors, the proposal that was rejected applied to Section 111 violations, while the provision that was adopted did not.

consideration and passage of the Gun Control Act. This recitation mainly parrots the government's presentation in *Simpson. Compare* U.S. BR. at 24-31, *with* Br. for the United States, note 4, *supra,* at 16-22. Here, as there, the government attempts to draw support for its position from remarks by Representative Poff concerning the competing amendment offered by Representative Casey. Representative Poff stated that his proposal "strengthens" the Casey amendment, 114 Cong. Rec. at 22231, and "appl[ies] to all Federal felonies including heinous crimes in all grades, down to the lowest level of a felony." *Id.* at 22233. However, these statements no more assist the government in this case than in *Simpson.* Read in context, they merely confirm that Representative Poff's proposal was intended to be stronger and more inclusive than the Casey amendment, which was limited to the use of a firearm in the commission of certain grave crimes of violence. *See id.* at 22229. The remarks of Representative Poff in no way contradict his formal explanation that Section 111 violations are simply beyond the scope of Section 924(c).

The government's brief in this case contains one refinement over its presentation of the legislative history in *Simpson.* The government attaches great weight to the modifications made to the Poff amendment by the Conference Committee, including the elimination of the prohibition on suspended sentences and probation for first offenders, and the elimination of the restriction on concurrent sentences. *See* H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31-32 (1968).

The government — and this Court — considered these changes to be "minor" in *Simpson.*[7] Nevertheless, the

[7]*See* Br. for the United States, note 4, *supra,* at 18 n.6; 435 U.S. at 14. The changes were partially undone in the Omnibus Crime Control Act

(continued)

government now argues that they were of great significance because they occasioned an outcry in the House among Congressmen favoring stiff penalties for crimes involving the use of firearms. Even Representative Poff, the government notes, believed these changes to be so serious that he voted against the Conference Report. *See* 114 Cong. Rec. at 30583, 30587. On the basis of this development the government asserts (at 36) that it is "impossible" to believe that Representative Poff intended armed assault to be punishable solely under Section 111, without any of the sentencing limitations contained in Section 924(c).

This argument is fundamentally misconceived. The proper scope of Section 924(c) can hardly be inferred from a view that plainly failed to be enacted.[8] However strong the sentiment may have been in the House in favor of severe punishment of armed offenses, the fact is that Congress adopted a statute that left room for mitigation of penalties. If anything, the action actually taken by Congress thus supports rather than undermines the limitation on the application of Section 924(c) to armed assault that Representative

(footnote continued from preceding page)

of 1970, Pub. L. No. 91-644, 84 Stat. 1889. Title II of that legislation amended Section 924(c) by reinstating the restriction on concurrent sentences. However, Title II retained the trial court's power to suspend sentences or grant probation for first offenders, while lowering the minimum mandatory sentence for repeat offenders from five to two years. *See* 435 U.S. at 14 n.9.

[8]In fact, many of those who criticized the Conference Committee modifications to the Poff proposal were opponents of the Gun Control Act. *See, e.g.*, 114 Cong. Rec. at 30582 (remarks of Reps. Watson and Sikes); *id.* at 30584 (remarks of Rep. Hansen); *id.* at 30586 (remarks of Rep. Saylor), all of whom voted against the House bill even with the original Poff substitute. *See id.* at 23096. The inference is irrestible that many Congressmen seized on the changes to the Poff amendment as merely another ground on which to urge defeat of the legislation.

Poff espoused in introducing his amendment.

More importantly, there is no need to draw inferences about what Congress meant with respect to Section 111 violations. Representative Poff explained exactly what was intended when he first offered his amendment, and he did so in terms that no one could misapprehend. *See* note 5, *supra.* The government, of course, is correct that Representative Poff's objective was to deter the use of firearms in the commission of federal felonies. The point here, however, is that he manifestly saw no need to accomplish this objective by extending Section 924(c) to existing statutes that already contained special penalties for firearm use.[9]

This surely was a reasonable judgment — wholesale application of Section 924(c) would have seriously disrupted the penalty structure of existing laws that already provided increased punishment for firearm use. *See* PET. BR. at 19-21. In all events, this was the judgment that Representative Poff expressly reached, and the basis on which both the House and the Senate acted on his proposal. As noted in our opening brief (at 11 n.11), there is no statement other than Representative Poff's explicit introductory remarks on his amendment to which the members of Congress could have looked to ascertain the scope of Section

[9]Indeed, as Congress was well aware (*see, e.g.*, 114 Cong. Rec. at 27142-43), in some cases these statutes provided a considerably stronger penalty than Section 924(c). Sections 2114 and 2113(d) of Title 18 prescribe a 25-year sentence — and in the case of Section 2114 it is mandatory — for armed robbery of a postal employee and armed bank larceny, respectively, even for a first offender. Even if the Double Jeopardy Clause permits adding the maximum 10-year term provided for a first offender in Section 924(c) to the penalty authorized for the underlying felony (*see* PET. BR. at 7 n.5), prosecution under Section 924(c) carries with it a potential over-all sentence significantly shorter than this.

924(c). Nothing in the original House debate or in the debate on the Conference Committee report indicates any decision to reject or revise Representative Poff's original views.

When the government first addressed the interplay of Sections 924(c) and 111, it concluded that Representative Poff's opening statement should be accorded "primary consideration" and, accordingly, "adopted this statement as [government] policy."[10] The government's efforts to back off this view now are strained and unpersuasive. The government was right the first time around.

2. The government's interpretation of Section 924(c) draws no support from any need to implement the deterrence rationale or to avoid anomalous applications of this provision.

The government strenuously argues (at 19-24) that Congress must have intended Section 924(c) to apply to Section 111 assaults, since defendants would otherwise escape the special sentencing requirements of Section 924(c), with assertedly "irrational" and "untenable" results. A similar, overblown claim was made and rejected in *Simpson. See* Br. for the United States, note 4, *supra,* at 12-15. The argument is no more convincing when recycled in this case.

There is no doubt that the stiff penalties of Section 924(c) are directed at the criminal use of firearms. However, the government's claim to an election of offenses cannot logically rest on the need to give effect to the deterrence

[10]Letter dated Jan. 13, 1972, from Carl W. Belcher, Chief, General Crimes Section, Criminal Division, to George Beall, United States Attorney, Baltimore, Maryland, *reprinted in* the appendix to the Supplemental Memorandum for the United States, *Simpson v. United States,* Nos. 76-5761 and 76-5796, filed on Nov. 22, 1977, at 2a.

rationale of Section 924(c). The government's argument proves far too much. If the government were correct — and Section 924(c) had to be applicable to implement the deterrent objective of that statute — there would never be a single occasion in which it would be appropriate to charge an armed assault under Section 111; the penalties prescribed under Section 924(c) would always be greater. Yet even the government concedes (at 47 n.22) that Section 924(c) did not impliedly repeal the enhancement paragraph of Section 111. *See* PET. BR. at 19 n.19.

The fact is that the government misses the mark in comparing the severity of the enhanced penalties provided by Sections 924(c) and 111. What matters is not whether Section 924(c) provides a greater sentence,[11] but that Section 111 focuses no less directly on deterring the use of firearms. *See* PET. BR. at 18. As discussed in the preceding section, Congress did not regard it as relevant in determining the coverage of Section 924(c) to ask which pre-existing enhancement statutes imposed a more onerous penalty than the Poff amendment and which did not. Exclusion from Section 924(c) turned simply on whether the other statute already prescribed an augmented sentence for the use of a firearm. Congress, in other words, adopted the common sense view that "[i]t is not necessary to deterrence to impose an increased penalty for use of a firearm by separate statute, when the substantive statute itself does so." *United States v. Eagle,* 539 F.2d 1166, 1172 (8th Cir. 1976), *cert. denied,* 429 U.S. 1110 (1977), *cited with approval in Simpson,* 435 U.S. at 14. Thus, as this Court concluded in *Simpson,* the limitation of Section 924(c) to provisions that do not already

[11]In fact, Section 924(c) does *not* provide a quantatively or qualitatively greater sentence than all of the pre-existing enhancement provisions cited by Representative Poff. *See* note 9, *supra.*

contain enhancement penalties for the use of a firearm "is in complete accord with, and gives full play to, the deterrence rationale of §924(c)." 435 U.S. at 13-14.

Moreover, the government's position is not helped by the examples it cites of allegedly anomalous applications of Section 924(c). Aside from compounding the government's error in comparing the relative size of enhancement penalties,[12] these illustrations overlook that the government's position is fraught with difficulties, too, as the government reluctantly concedes in a footnote elsewhere in its brief (at 47 n.25).

For example, a person using a knife to rob a postal employee would face a mandatory 25-year sentence under 18 U.S.C. §2114, while his counterpart with a pistol could be let off with a mere one-or-two year sentence if prosecuted for unaggravated violation of Section 2114 and for violation of Section 924(c). Similarly, a first offender using a knife to commit grand bank larceny could be sentenced up to 25 years under 18 U.S.C. §2113(d), but his counterpart with a gun would face at most a 20-year sentence if charged under Sections 2113(b) and 924(c).

It is true, as the government suggests (at 47 n.25), that these anomalies can be avoided by prosecuting the gun-wielding defendant in these examples, like his counterpart with the knife, under Section 2114 or 2113(d). But that

[12]For instance, in example (b) on p. 22 of the government's brief the government finds it significant that one defendant is subject to twice the enhanced punishment of the other. What the government conveniently ignores is that Doe is subject to a total sentence (assuming no Double Jeopardy bar) of 15 years for burglarizing the post office with a firearm, while Roe is subject to a total punishment of 25-years imprisonment for armed bank robbery. Even if this result is achieved by increasing Roe's punishment by only half as much as Doe's, it hardly follows that Roe's enhanced penalty is inadequate for deterrence purposes or that the result itself is irrational.

hardly alters the fact that in these examples the government's own reasoning dictates that the firearm violation *always* be punished under the more severe terms of the pre-existing enhancement statute rather than under Section 924(c), and that flatly contradicts the government's theory of an election of offenses. Because the government's own theory is thus internally inconsistent, guidance in the proper interpretation of Section 924(c) logically must be sought elsewhere than in the attempt to avoid assertedly "irrational" applications of Section 924(c).[13]

3. Section 111 takes precedence over Section 924(c) because a specific criminal statute governs over a general one.

As previously noted, the Justice Department originally

[13]There is nothing mysterious about the fact that both sides in this case can claim that the other's construction of Section 924(c) results in anomalies. This phenomenon arises from the fact that (a) Section 924(c) and each of the pre-existing enhancement statutes only partially overlap and (b) Section 924(c) prescribes greater penalties in comparison to some of these statutes, but not others. Thus, when Section 924(c) provides the greater penalty, petitioner's construction results in more lenient punishment for the use of a firearm to violate the pre-existing statute than for the use of a firearm to commit another felony. On the other hand, when the pre-existing statute prescribes the greater penalty, the government's interpretation condones more lenient punishment for the use of a firearm than for the use of any other dangerous weapon by permitting prosecution under Section 924(c).

The anomaly caused by the government's construction is contrary to the legislative intent of "enacting Section 924(c) to punish with special severity the criminal use of firearms," as the government itself interprets it (at 22). However, the purported anomaly created by petitioner's construction is, we submit, no anomaly at all. The fact that a defendant may receive a lesser augmented penalty for using a firearm in violation of Section 111, for example, than for using a firearm to commit some other felony merely reflects Congress's specific judgment that armed assault of a federal officer is appropriately punished by no more than a 10-year term of imprisonment.

determined not to prosecute a defendant under Section 924(c) in the case of a Section 111 violation because, even apart from the legislative history of Section 924(c), the terms of a specific criminal statute govern where a general and a specific statute inconsistently address the same concern. *See* 435 U.S. at 16. In its about-face the government now advances a series of arguments that, if anything, demonstrate that the government was right in its original views.

The government persists in arguing (at 21 n.7, 43) that Section 924(c) rather than Section 111 is the more specific provision. However, we have already demonstrated that this is palpably incorrect. *See* PET. BR. at 17-21. Since Section 924(c) addresses the use of a firearm in the commission of felonies in general, Section 111 certainly is the more specific provision in prescribing the appropriate punishment for the use of a firearm in assaulting a federal officer in particular.[14] Indeed, the pre-existing enhanced penalty provisions of Title 18 represent a scale of punishments, carefully graded according to the nature of the particular crime and the threat posed to the interests of the United States, which wholesale application of Section 924(c) would totally disrupt.

Nor, contrary to the government's claim (at 44-47), can Sections 924(c) and 111 be harmonized so that they both apply. As shown by the government's own argument

[14]Moreover, contrary to the government's argument (at 21 n.7), Section 111, if anything, embodies the more contemporary view of the appropriate punishment for armed offenses. Pending legislation to codify Title 18 would establish maximum sentences for the criminal use of a firearm much more in line with the provisions of Section 111 than 924(c). *See* S. 1722, 96th Cong., 1st Sess. §§1823, 2301 (1979) (use of a firearm in the commission of a crime of violence subject to a maximum five-year term of imprisonment); H.R. 6233, 96th Cong., 2d Sess. §§2723, 3702 (1980) (use of a firearm in the commission of a felony subject to a maximum 80-month sentence for a first offender and a 160-month sentence for a repeat offender).

emphasizing the severity of Section 924(c) penalties, the sentencing provisions of Section 924(c) and 111 are incompatible, particularly in the maximum imprisonment terms that they authorize. The same inconsistency obtained in *United States v. Batchelder, supra,* as the government points out. However, in that case not only was there affirmative evidence that Congress intended Sections 922(h) and 924(a) to overlap (*see* p. 5, *supra*), but neither statute was in any sense more specific than the other. In both respects the present case is clearly distinguishable.[15]

Simpson resolved that Section 924(c) gives way to the other enhanced penalty provisions of Title 18, since those statutes focus more narrowly on the use of weapons in the context of specific crimes. The government has not offered any sound reason for reconsidering this conclusion.

[15]The government also contends (at 43) that the interpretative preference for specific criminal statutes can be dismissed in this case as nothing more than a corollary of the rule of lenity. We show below that the rule of lenity is no less applicable here than in *Simpson,* since the statutory ambiguity that triggers the rule is the same in both cases. But even if there were no such ambiguity here, the interpretative preference for specific criminal statutes would still require that Section 111 take precedence. *Simpson* holds that this principle is a corollary of the rule of lenity, not because it, too, rests upon a finding of ambiguity, but because it limits possible prosecution to one statute instead of two where both statutes inconsistently address the same concern. 435 U.S. at 15-16.

The government's erroneous characterization of the basis of the specificity principle only underscores that *Simpson's* reliance on this rule of construction cannot be squared with the government's theory of an election of offenses. *See* pp. 3-4, *supra.*

4. The rule of lenity precludes the imposition of an enhanced penalty for armed assault under Section 924(c).

Finally, the government argues (at 41-43) that the last aid to interpretation relied on by petitioner — the rule of lenity — is also inapplicable here because there is no ambiguity to be resolved in his favor. Once again, the same argument was advanced in *Simpson* and properly rejected. *See* Br. for the United States, note 4, *supra*, at 25 n.10. It has even less force the second time around.

Contrary to the government's suggestion, the ambiguity concerning the scope of Section 924(c) is not limited to its application to the second paragraph of Section 111. The question raised by the legislative history of the Gun Control Act and by the interpretative preference for specific criminal laws is whether Section 924(c) applies in the case of *any* violation of Section 111, simple or aggravated. The issue to which Representative Poff and Senator Dominick spoke was whether Section 924(c) reaches the use of a firearm that is already subject to a special penalty pursuant to the terms of the underlying felony statute. Likewise, the inconsistency to be resolved by the interpretative preference for specific statutes is whether Section 924(c) or the second paragraph of Section 111 governs the sentencing of a defendant who uses a firearm in violation of the first paragraph of Section 111.

Thus, if the legislative history of Section 924(c) and the interpretative preference for specific criminal statutes do not resolve the reach of Section 924(c), at the very least they create an ambiguity whether Section 924(c) applies to Section 111 assaults. As in *Simpson*, the rule of lenity requires that this ambiguity be resolved in the defendant's favor. *See* PET. BR. at 14-17.

II.

PETITIONER CANNOT NOW BE RE-SENTENCED UNDER COUNTS 6 AND 7.

Evidently recognizing the weakness of its asrguments on the merits of this petition, the government now advances a fallback position. In the event that the Court determines that Section 924(c) does not embrace violations of Section 111, the government asks the Court:

> "to vacate petitioners' sentence on the Section 111 counts [Counts 6 and 7] and to remand for re-sentencing on those counts, subject to (1) the maximum statutory penalty authorized by Section 111, and (2) the limitation that the new sentence cannot exceed that previously imposed for the armed assault offenses under Sections 924(c) and 111." U.S. BR. at 57.[16]

The express purpose of this relief is to enable the district court to re-impose the total original sentence given LaRocca, despite reversal of the Section 924(c) conviction.[17]

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[16]In addition to the Section 924(c) charge in Count 19, LaRocca was convicted under Counts 6 and 7 of using a dangerous weapon to assault federal officers in violation of Section 111. Exercising the enhancement authority of this provision, the district court then sentenced LaRocca to concurrent five-year terms on these assault charges. The court also imposed a 20-year term on Count 19, to be served consecutively to all other sentences.

[17]Contrary to the government's assessment (at 58 n.34), the total permissible sentence that could be meted out to LaRocca under the government's proposal would be 20 rather than 30 years. On July 3, 1979, the U.S. District Court for the Western District of Pennsylvania vacated LaRocca's prior Section 924(c) conviction, which had provided the basis for his 20-year sentence as a repeat offender under Section 924(c) in this case. *See United States v. Busic*, Crim. A. No. 73-221. Since LaRocca, therefore, is entitled in any event to a ten-year reduction in his original 30-year sentence, *see, e.g., Murgia v. United States*, 448 F.2d 1275 (9th Cir. 1971), the appropriate benchmark under the government's formula is 20 years.

We submit that this extraordinary request must be denied. Not only has the government failed properly to raise the issue by cross-petition, but the relief requested, in any event, is contrary to Rule 35 of the Federal Rules of Criminal Procedure, the Due Process Clause, and the Double Jeopardy Clause of the Constitution.

A. The Failure To Cross-Petition Is Fatal To The Government's Request For Resentencing Under Counts 6 And 7.

As the government recognizes (at 70 n.41), its failure to file a cross-petition for a writ of certiorari in this case raises the question whether consideration of its resentencing request is procedurally barred. "The rule is inveterate and certain" that an appellee "in the absence of a cross appeal" may not attack the judgment below " 'with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . . .' " *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937), quoting *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924). "The established doctrine . . . is that a party must cross-appeal or cross-petition if he seeks to change the judgment below or any part thereof." R. Stern & E. Gressman, *Supreme Court Practice* 478 (5th ed. 1978). *See, e.g., United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Swarb v. Lennox*, 405 U.S. 191, 201 (1972). *See also* Sup. Ct. R. 23(1)(c) (the Court will consider "[o]nly the questions set forth in the petition or fairly comprised therein").[18]

[18]The principle is also well-established that "a cross-petition is not necessary to enable a party to advance any ground, even one rejected or

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The government appears to claim that its resentencing request does not run afoul of this rule because the request merely addresses the proper disposition of the case without the government's seeking any greater relief than it was afforded in the court of appeals.[19] But this is simply not so.

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not considered below, in support of the judgment in his favor." R. Stern & E. Gressman, *supra*, at 478. However, in this case the government does not, and cannot, claim that its argument merely affords an additional basis for affirming the Section 924(c) conviction. Indeed, the argument has nothing whatever to do with the merits of that issue. Moreover, not only does the logic of the argument require a modification of the judgment, but the government seeks exactly that result. In these circumstances the authorities are unanimous that in the absence of a cross-petition the argument cannot be heard. *See also, e.g., id.* at 479 (cross-petition always necessary to raise argument relating to claim not covered by initial petition), 480-86 (cross-petition possibly required to raise argument that logically would result in modification of the judgment even if that relief is not sought).

[19]The government cites 28 U.S.C. §2106 in this connection, but that statute has no bearing on the procedural defect in the government's argument. This provision merely authorizes appropriate relief based on arguments and issues that have been properly raised. It does not enlarge the arguments or issues open for review, and certainly does not justify a change favorable to a non-cross-petitioning respondent in a portion of the judgment not challenged by the petitioner. Thus, if, as here, the respondent seeks a disposition that raises an issue not "set forth in the petition or fairly comprised therein," Sup. Ct. R. 23(1)(c), or that constitutes a change in an unchallenged part of the judgment below, 28 U.S.C. §2106 does not cure the respondent's error in failing to file a cross-petition. *See* 6A J. Moore, *Federal Practice* ¶59.09[5], at 59-232 (2d ed. 1979) ("very doubtful . . . that Congress intended [in Section 2106] to give the appellate courts unconditional power to deal with a case, once it is appealed, without regard to the power that appellate courts had traditionally exercised") (footnote omitted).

Nothing in *Haynes v. United States*, 390 U.S. 85, 101 (1968), on which the government relies, is to the contrary. The Court there reversed the petitioner's conviction outright rather than remand for the formality of further findings. The decision did not address any issue not fairly embraced by the petition or alter the judgment below in any way favorable to the non-cross-petitioning respondent, and thus is of no significance here.

Elsewhere in its brief (at 63 n.37) the government acknowledges that "the court of appeals . . . conclud[ed] (App. 47) that petitioner LaRocca could *not* be resentenced to a greater punishment . . . on the Section 111 counts . . . than he had initially received for the offense." (Emphasis added.)[20] The government's resentencing request obviously seeks modification of this limitation, and for that a cross-petition was required.[21]

[20]The court of appeals specifically stated in its original decision that the trial court could not impose a more severe sentence if the government elected to proceed under Counts 6 and 7 on remand. A. 47, 587 F.2d 577, 584. Although this portion of its first decision was vacated upon rehearing, A. 59, 587 F.2d at 588, that was for reasons having nothing to do with this statement. Indeed, it is clear that the court meant the same limitation to apply to the final judgment, since the court's opinion on rehearing expressly noted that the government could preserve the total of LaRocca's original sentences by proceeding on remand under Count 19 rather than under Counts 6 and 7, which ran concurrently with other counts. A. 59 n.2, 587 F.2d at 588 n.2. The court obviously intended, in accordance with established doctrine in the Third Circuit, that LaRocca's Section 111 sentences could not be increased on remand. *See, e.g., United States v. Welty,* 426 F.2d 615, 618 (3d Cir. 1970) ("We would open the door wide to an invasion of rights of defendants if an attack by a defendant on an illegal sentence could be employed for reconsideration of the sentences on other counts which are valid and which he has not attacked, in order to award the government the same ultimate punishment as that originally imposed on all the counts.").

[21]This conclusion is sound despite the fact that, as the government notes, the resentencing issue was presented in its brief in the court of appeals and in its response to LaRocca's petition, albeit in a somewhat different form. (The government in those briefs sought resentencing on *all* remaining counts rather than merely Counts 6 and 7.) It is settled that inclusion of an argument in a response to a petition for a writ of certiorari after the time for filing a cross-petition has expired, as here, cannot satisfy the respondent's burden of cross-petitioning. *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 92 n.2 (1978); *NLRB v. International Van Lines,* 409 U.S. 48, 52 n.4 (1972), *discussed* in Stern, *When to Cross-Appeal or Cross-Petition — Certainty or*

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For this reason the government's fall-back position in this case should not even be considered.

B. The Principles Of Finality Embodied In Federal Criminal Rule 35 Preclude Resentencing Under Counts 6 And 7

Before adoption of the Federal Rules of Criminal Procedure it was settled that the trial courts in the federal system had no authority to increase a valid sentence that had been affirmed on appeal and thereby had become final. This was so even if the increase was necessary to effectuate the court's intent in originally sentencing the defendant. *United States v. Tuffanelli,* 138 F.2d 981 (7th Cir. 1943); *Morris*

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Confusion?, 87 Harv. L. Rev. 763, 771 n.45 (1974). *See also* R. Stern & E. Gressman, *supra,* at 491 (in opposing a petition for a writ of certiorari, respondent "may not seek, whether by way of argument or of presenting a question, to overturn any portion of the judgment without filing a cross-petition").

Likewise, the government was obligated to cross-petition in this case regardless of any administrative burdens that this requirement may have imposed. The government joined petitioner in asking the Court to review the judgment below and, therefore, was plainly on notice of the need to assess its interests in cross-petitioning in this case. Moreover, although commentators have, as the government notes, remarked on the burdens created by the cross-petition rule, *see* Stern, *supra,* at 775-76, this has only been in the limited context of recommending that respondents always be allowed without cross-petitioning to raise arguments in support of the judgment below. The administrative burdens of the rule when the question is whether the government actually wants a change in the judgment are less significant. These burdens, in any event, certainly cannot justify permitting respondents to seek a change in the judgment in the absence of a cross-petition without eliminating altogether the well-established — and, so far as we are aware, universally approved — procedure that a cross-petition in these circumstances is, indeed, required.

v. United States, 185 F. 73 (8th Cir. 1911). *See also Barnes v. United States,* 223 F.2d 891, 892 (5th Cir. 1955).[22] This principle is now codified in Federal Criminal Rule 35, and prohibits the resentencing of LaRocca on his Section 111 convictions.

Rule 35 provides in pertinent part that "[t]he court may correct an *illegal* sentence at any time" and "may *reduce* a sentence" within 120 days after affirmance on appeal. (Emphasis added.)[23] Rule 35 grants no power whatever to increase a sentence that has been affirmed on appeal — and by negative implication it prohibits such an increase. *See Barnes v. United States, supra.* This limitation has been

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[22]In *Tuffanelli* the trial judge on remand increased the defendants' sentences on certain valid counts to compensate for the reversal of their convictions on other counts. The court of appeals had no difficulty in concluding that this action was beyond the trial court's power, stating:

> "We have made a careful search for and study of cases and we have found none which has upheld the authority of a trial court to change or alter a lawful judgment after affirmance by an appellate court . . . ." 138 F.2d at 983.

[23]Rule 35 reads in full:

> "(a) *Correction of Sentence.* — The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
>
> "(b) *Reduction of Sentence.* — The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."

uniformly followed in the federal courts.[24] *E.g., United States v. Fredenburgh,* 602 F.2d 1143, 1147 (3d Cir. 1979); *United States v. Corson,* 449 F.2d 544, 550 (3d Cir. 1971); *Pugliese v. United States,* 353 F.2d 514 (1st Cir. 1965).[25]

Since the appellate courts have no power to authorize a different result in remanding cases to the trial court,[26] the

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[24]Whether the district court is powerless to increase a sentence after the sentence has been announced and before appeal is not as clear. *Compare, e.g., Vincent v. United States,* 337 F.2d 891, 893-94 (8th Cir. 1964), *cert. denied,* 380 U.S. 988 (1965), *with, e.g., United States v. Adams,* 362 F.2d 210, 211 (6th Cir. 1966), and *United States v. Walker,* 346 F.2d 428, 430 (4th Cir. 1965).

Although this question need not be resolved in this case, it is significant, nonetheless, that the decisions permitting increases generally seem to have involved changes to the sentence even before judgment was first entered in the trial court. *See* Fed. R. Crim. P. 32(b); Fed. R. App. P. 4(b). *See also United States v. Addonizio,* 442 U.S. 178, 189 (1979) ("once a sentence has been imposed, the trial judge's authority to modify it is . . . circumscribed [by] Rule 35 . . . .").

[25]The court of appeals in *Fredenburgh* succinctly explained the trial judge's sentencing powers after remand:

> "A related problem arises when a defendant's appeal results in a reversal of his conviction on certain counts and affirmance of his conviction on other counts. The *Pearce* decision [*North Carolina v. Pearce,* 395 U.S. 711 (1969)] controls the trial judge's sentencing authority with respect to any new sentence imposed upon a conviction entered after a retrial on the reversed counts. *With respect to the counts on which the conviction was affirmed, a district court judge on remand has no authority to increase the sentences imposed on those counts.*" 602 F.2d at 1147 (emphasis added).

[26]*Pugliese v. United States, supra,* 353 F.2d at 516; *United States v. Tuffanelli, supra,* 138 F.2d at 983, 985.

It would be odd if an appellate court could permit a trial court to fashion relief that the trial court would otherwise be unable to award. *See also* Fed. R. Crim. P. 54(a) (rules govern criminal proceedings in courts of appeals and Supreme Court as well as in district courts). Section 2106

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government's fall-back position must be rejected even if it is properly before this Court. LaRocca's Section 111 sentences have been affirmed on appeal and are final.[27] Rule 35 and the principles of finality that it embodies dictate that those sentences, therefore, cannot now be increased.

C. The Due Process Clause Forbids Resentencing Under Counts 6 And 7.

The Fifth Amendment's Due Process Clause also forecloses the argument that the government presses here. In *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), this Court held that the Due Process Clause "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." "[T]o assure the absence of" "a retaliatory motivation on the part of the sentencing judge," the Court further held that the judge may not impose an increased sentence unless justified by specific findings "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time

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of Title 28, on which the government relies, certainly does not authorize the appellate courts to countermand the Rules of Criminal Procedure or the traditional principles that they codify. *See* note 19, *supra; United States v. Tuffanelli, supra,* at 984 (predecessor provision of 28 U.S.C. §2106 does not permit resentencing on affirmed counts on remand).

[27]These sentences became final when the government failed to file any cross-petition. *See, e.g.,* R. Stern & E. Gressman, *supra,* at 479 ("When a judgment disposes of separate claims, whether in a separate provision or not, a cross-petition or cross-appeal must be taken to present arguments relating to items other than those covered by the initial appeal."); pp. 18-21, *supra.*

of the original sentencing proceeding." *Id.* at 725-26.[28]

In *Blackledge v. Perry*, 417 U.S. 21 (1974), the Court applied an even stronger remedy to guard against the risk of vindictiveness. The defendant there had originally been convicted of a misdemeanor in a state prosecution. When he invoked his right under local procedures to a trial *de novo,* the prosecutor "upped the ante" by re-indicting him on a felony charge covering the same conduct. *Id.* at 28. This Court readily concluded that "the same considerations [governing *Pearce*] apply here," *id.*, since the possibility "of increased punishment upon retrial . . . pose[d] a realistic likelihood of 'vindictiveness' " for the exercise of appellate rights. *Id.* at 27. However, the Court ruled that the state had to dismiss the felony conviction rather than merely resentence the defendant under *Pearce* guidelines. "[T]he very institution of the felony indictment" constituted the due process violation, and that violation could not otherwise be remedied. *Id.* at 30-31 & n.8.

The government argues (at 63 n.37) that these principles have no application here because, under its proposal, the maximum cumulative sentence on remand could not exceed the over-all term of imprisonment that was originally imposed. But this argument misconceives the purpose behind the due process protections. As this Court has

[28]The Court held in *Pearce* that "due process also requires that a defendant be freed of apprehension of . . . a retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725. As the Court explained in *Chaffin v. Stynchcombe,* 412 U.S. 17, 24-25 (1973), "Those actually subjected to harsher resentencing as a consequence of such motivation would be most directly injured, but the wrong would extend as well to those who elect not to exercise their rights of appeal because of a legitimate fear of retaliation." The prophylactic rule adopted by the Court, accordingly, was intended to eliminate both actual vindictiveness and the appearance of vindictiveness for the exercise of appellate rights.

repeatedly stressed, it is the likelihood of vindictiveness or perceived vindictiveness that triggers the *Pearce* and *Perry* limitations — not the risk that a defendant will be worse off after an appeal than before.[29] Obviously the imposition of the same cumulative sentence so as to negate a successful appeal may be just as vindictive as the imposition of a more severe sentence on a single-count indictment. Since the opportunity to retaliate against the accused is no less available when the over-all term of imprisonment is limited, *Pearce* and *Perry* must be applied on a per-count rather than a cumulative-sentence basis.[30]

In fact, the potential for abuse is greater here than in

[29]*Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *Blackledge v. Perry, supra*, 417 U.S. at 27; *Chaffin v. Stynchcombe, supra*, 412 U.S. at 25-26, 29; *Colten v. Kentucky*, 407 U.S. 104, 116 (1972); *North Carolina v. Pearce, supra*, 395 U.S. at 723-25.

A resentencing proceeding under the government's proposal would contain none of the safeguards that were regarded as controlling in *Colten v. Kentucky, supra*, and *Chaffin v. Stynchcombe, supra*. Here the resentencing court would be fully aware of the sentences imposed on LaRocca initially. Thus, the prerequisite for retaliatory sentencing would be clearly present. In addition, the enhanced penalty would be imposed by the very court responsible for the original judgment. That court undeniably would have, or at least appear to have, a stake in vindicating its original judgment by negating the effect of the successful appeal.

[30]The government suggests that the cumulative cap it proposes on resentencing will prevent any defendant from actually being deterred from appealing. In fact, this is not so. Under the government's proposal defendants to multi-count indictments would be apt not even to bother appealing even a clearly erroneous conviction so long as one or more counts exist that are not subject to challenge and that could sustain the original cumulative sentence.

In any event, any sentence that, in fact, is imposed for vindictive reasons clearly offends the Due Process Clause, whether or not the likelihood of vindictiveness deters defendants from appealing. Moreover, the prophylactic remedies adopted in *Pearce* and *Perry* are as much designed to eliminate actual retaliation against defendants as the appearance of retaliation. *See* note 28, *supra*.

Pearce and *Perry*. Any increase in LaRocca's Section 111 sentences would not follow a retrial, at which the evidence might differ from what was presented in the first trial. Instead, the judge presiding at the resentencing proceeding desired by the government would be presented with absolutely nothing new — except the fact that LaRocca succeeded in reversing this Section 924(c) conviction. Imposition of a more severe sentence in these circumstances would make the inference of vindictiveness almost irresistible.

But the problems with the government's position are far deeper than this. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . ." *Bordenkircher v. Hayes, supra*, 434 U.S. at 363. To punish a person because of a crime that he did not commit is even worse. Yet the government's resentencing proposal would undermine this second precept of due process no less than the first.

If this Court holds that Section 924(c) is not available for prosecution of a Section 111 felony, resentencing of LaRocca would make punishment possible not merely for a successful appeal, but for a crime that he did not commit and for which he could not even be prosecuted. Patently, the sentencing judge could no more do this than he could base a sentence on past convictions that have been reversed because of constitutional error. *United States v. Tucker*, 404 U.S. 443 (1972).[31] In short, the government's re-

[31]If Congress were to repeal Section 924(c) retroactively, the fatal due process implications of resentencing LaRocca on Counts 6 and 7 would be evident — resentencing obviously would enable the government to punish LaRocca indirectly for the use of a firearm when Congress would have determined that it cannot do so directly. *See United States v. Stewart*, 585 F.2d 799, 801 n.5 (5th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979). No difference can arise from the fact that LaRocca has been erroneously convicted under Section 924(c) in the first place.

sentencing proposal poses the substantial risk of both vindictive and unauthorized punishment, irrespective of whether the total, cumulative sentence remains the same.

We submit that the remedy required by the Due Process Clause to avoid these risks is to forbid resentencing altogether. As in *Perry*, the *Pearce* guidelines on resentencing will not suffice to prevent constitutional error. "Objective information" of the kind required by *Pearce* (395 U.S. at 726) simply cannot exist to overcome the obvious inference under the government's proposal that an impermissible motivation has played some part in any increased sentence imposed on remand.

The hazards of resentencing are demonstrated in this very case by the government's contention (at 58, 59) that LaRocca will enjoy "an unanticipated and undeserved windfall" unless his Section 111 sentences are subject to increase. The basis for this bold assertion is the unadorned claim that it is "inconceivable" that the trial judge would have imposed a five-year sentence on the Section 111 convictions if he had known that LaRocca's conduct did not additionally violate Section 924(c).[32]

We are not so clairvoyant; nor, do we believe, is any appellate court that has set aside one conviction and is asked to permit resentencing on a separate, and unchallenged, conviction. The plain fact is that the government's own theory presupposes that the trial judge was mistaken both as to the applicability *vel non* of Section 924(c) and as to the maximum term of imprisonment authorized by Congress. Indeed, if Count 19 is invalid, the judge labored under the

[32]Interestingly, even the government acknowledges that there is some uncertainty as to what the sentencing judge intended. The government states (at 60 n.36) that "[o]f course, the district court on remand is not obligated to impose a sentence equivalent to that originally ordered."

misapprehension that LaRocca could be sentenced to 45- rather than 20-years imprisonment for the armed assaults.[33]

The government itself vigorously argues on this appeal — erroneously, as we show above — that Section 924(c) is unique in its strict deterrent purpose, and in its embodiment of a specific congressional intent to impose particularly harsh penalties in felony cases involving the use of guns. Who is to say that the sentencing judge did not share this belief? If he did, his decision to impose 5-year concurrent sentences for the Section 111 convictions was not arbitrary at all. Indeed, it is a fair inference that his allocation of sentences on LaRocca's various convictions depended on the applicability of Section 924(c). Thus, as the court of appeals stated in *United States v. Welty, supra*, 426 F.2d at 618:

> "This [very case] illustrates the undesirability of attempting to reconstruct the intention of the sentencing judge from indications, however unambiguous, of his intention at the time he acted under a misapprehension of the law."[34]

The courts of appeals have consistently refused to allow resentencing even in cases in which all convictions are left undisturbed, and in which the sentencing judge's original intention — defeated by inadvertent error — is relatively

[33]Moreover, any criminal trial lawyer or judge knows better than the government's extraordinary statement (at 59) that the trial court's apportionment of time among Counts 6, 7, and 19 was "of no practical consequence." Appellate reversals of selected counts commonly affect total time served.

[34]*See United States v. Addonizio, supra*, 442 U.S. at 187-88 ("the subjective intent of the sentencing judge would provide a questionable basis for testing the validity of his judgment," since "it will often be difficult to reconstruct with any uncertainty the subjective intent of the judge at the time of sentencing.").

clear and unambiguous. These courts have correctly reasoned that "the possibility of abuses inherent in broad judicial power to increase sentences outweighs the possibility of windfalls to a few prisoners." *United States v. Sacco,* 367 F.2d 368, 370 (2d Cir. 1966).[35] In the instant case, by contrast, a crucial conviction is vacated, and the sentencing judge's original intention is necessarily, therefore, anything but clear. To permit LaRocca's attack on Count 19 to justify increased sentences on Counts 6 and 7 in these circumstances "would open the door wide to an invasion of the rights of defendants . . . ." *United States v. Welty, supra,* 426 F.2d at 618.

Pearce itself demonstrates that ambiguities in the sentencing judge's original intention are to be resolved in the defendant's favor. In holding that one of the defendants there was entitled under the Double Jeopardy Clause to credit on his 25-year resentence for two and a half years already served (*see* note 38, *infra*), the Court remarked that the trial court could have negated the credit simply by increasing the defendant's resentence to 27½ years. *See* 395 U.S. at 719 n.14. Nonetheless, the Court refused to remand the case to determine whether the sentencing judge actually intended the accused to serve another 25 or another 22½ years.

"[T]he Court thus made a constitutional judgment that the ambiguity in the judge's sentence must be construed in favor of lenity in order to avoid the potential risk of double punishment." Westen & Drubel, *Toward A General Theory of Double Jeopardy,* 1978 The Supreme Court Review 81, 110 (1979). Although this judgment was reached under the

[35] *See also, e.g., United States v. Best,* 571 F.2d 484 (9th Cir. 1978); *United States v. Turner,* 518 F.2d 14 (7th Cir. 1975); *Chandler v. United States,* 468 F.2d 834 (5th Cir. 1972); *United States v. Welty, supra.*

Double Jeopardy Clause, the same judgment should be dispositive with respect to petitioner's due process claim. *Cf. Blackledge v. Perry, supra,* 417 U.S. at 31. The constitutional prohibition against multiple punishments for the same offense cannot be subordinated to the uncertain and shifting intentions of the sentencing judge.[36]

D. The Double Jeopardy Clause Bars Resentencing Under Counts 6 and 7.

Procedural requirements, Rule 35, and due process all aside, the government's resentencing theory runs into yet one more obstacle. As shown in the discussion of *Pearce* just presented, the theory contravenes the Double Jeopardy Clause of the Fifth Amendment, too. Although this Court has not previously ruled directly on this question, the lower federal courts have "resolved" it against the government, as the government itself concedes. U.S. BR. at 66 & n.38. More importantly, fundamental double jeopardy principles established in this Court's prior decisions dictate that a final, valid sentence cannot be increased without punishing the defendant twice for the same offense.

As long ago as *Ex parte Lange,* 18 U.S. (Wall.) 163, 168 (1874), this Court held:

> "If there is anything settled in the jurisprudence of England and America, it is that *no man can be twice*

[36] Even if not required by the Due Process Clause to forbid resentencing, this Court should do so in the exercise of its supervisory powers over the federal courts. In addition to precluding unconstitutional sentences, a resentencing bar, at the very least, would serve the salutary purpose of encouraging trial judges carefully to tailor the sentences they impose when they first announce them. It would also avoid the unseemly review of the subjective motivations of the sentencing judge that a *Pearce*-statement-of-reasons approach would entail.

> *lawfully punished for the same offense.* And though there have been nice questions in the application of this rule [in some] cases . . . , *there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.*" (Emphasis added.)[37]

Simply put, the Double Jeopardy Clause "protects the accused . . . from attempts to secure additional punishment after a prior conviction and sentence . . . ." *Brown v. Ohio,* 432 U.S. 161, 165-66 (1977). Government may not compel a defendant "to live in a continuing state of anxiety and insecurity," *Green v. United States,* 355 U.S. 184, 187-88 (1957), by holding over him the threat of a second punishment. "When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense." *United States v. Wilson,* 420 U.S. 332, 343 (1975).[38]

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[37] *See also, e.g., North Carolina v. Pearce, supra,* 395 U.S. 711, 717-18; *Reid v. Covert,* 354 U.S. 1, 37 n.68 (1957) (dictum); *In re Bradley,* 318 U.S. 50 (1943); *United States v. Benz,* 282 U.S. 304, 306 (1931) (dictum); *Murphy v. Massachusetts,* 177 U.S. 155, 160 (1900) (dictum).

[38] The government engages (at 68-69) in an extended discussion of the *Lange* decision that we are not certain we understand. But if the government is suggesting that the only double jeopardy limitation on resentencing is that the total punishment exacted be within the legislature's authorization, then the government is plainly wrong.

Not only would this narrow reading of *Lange* render superfluous the Court's grounding of that decision on double jeopardy principles, as the government itself acknowledges (at 69 n.40), but it would be flatly inconsistent with later decisions interpreting and re-affirming *Lange's* double jeopardy-based holding. Thus, in *United States v. Benz, supra,* the court held that the Double Jeopardy Clause permits the sentencing

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The double jeopardy protection against multiple punish-

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judge to "amend a sentence so as to mitigate the punishment, but not so as to increase it . . . ." 282 U.S. at 307. The Court explained that this distinction:

> "is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that *to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution . . . . This is the basis of the decision in Ex parte Lange.*" *Id.* (emphasis added).

Similarly, it would follow from the narrow reading of *Lange* that the trial judge there would have acted unobjectionably if he had first offered to return the fine to the defendant before amending the judgment and imposing imprisonment as an alternative; in that case, the punishment would have been fully authorized by statute. However, this precise variation on the *Lange* facts was presented to the Court in *In re Bradley, supra.* The Court squarely rejected the argument that the double jeopardy bar was avoided because of the fact that the judge had sought to return the fine before amending the judgment. 318 U.S. at 52.

North Carolina v. Pearce also forecloses any suggestion that the function of the Double Jeopardy Clause is merely to assure that punishments are kept within the maximums prescribed by Congress. In holding that "this basic constitutional guarantee is violated when punishment already exacted for an offense is not fully 'credited' in imposing sentence upon a new conviction for the same offense," the Court in *Pearce* specifically elaborated that while "[t]he constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction," "*the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.*" 395 U.S. at 718 (emphasis added).

Finally, the proper reading of *Lange* has not escaped the attention of the many courts of appeals that, relying on this decision, have time and again rebuffed government efforts to increase valid sentences based on uncontested convictions. *See* U.S. BR. at 66 n.38. Significantly, three of these decisions, *United States v. Sacco, supra, United States v. Adams, supra,* and *Kennedy v. United States,* 330 F.2d 26 (9th Cir. 1964), were cited with approval in *Pearce,* 395 U.S. at 717 n.11. *See also Reid v. Covert, supra,* 354 U.S. at 37 n.68 (dictum); *Murphy v. Massachusetts, supra,* 177 U.S. at 160 (dictum).

ments must attach when sentence is imposed and final judgment is entered.[39] This accords with "the expectations created in a defendant when he is properly convicted and sentenced," *United States v. Fredenburgh, supra,* 602 F.2d at 1147-48, and recognizes that "the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment...." *United States v. Scott,* 437 U.S. 82, 92 (1978).[40] Accordingly, "[a] defendant who has stood trial and been convicted and sentenced by the the district court has been placed once in jeopardy." *United States v. DiFrancesco,* 604 F.2d 769, 783 (2d Cir. 1979), *petition for writ of certiorari pending* (No. 79-567).[41]

[39]*See* Fed. R. Crim. P. 32(b); Fed. R. App. P. 4(b); *Berman v. United States,* 302 U.S. 211, 212 (1937): "Final judgment in a criminal case means sentence. The sentence is the judgment."

[40]*See Crist v. Bretz,* 437 U.S. 28, 33 (1978) (emphasis added; footnotes omitted):

> "The Fifth Amendment guarantee against double jeopardy derived from English common law, which followed then, as it does now, the relatively simple rule that a defendant has been put in jeopardy only when there has been a conviction or an acquittal — after a complete trial. *A primary purpose served by such a rule is . . . to preserve the finality of judgments.*"

Of course, as developed in the United States, double jeopardy protections apply in many instances "even where no final determination of guilt or innocence has been made." *United States v. Scott, supra,* 437 U.S. at 92.

[41]*DiFrancesco* held that the government may not seek to increase a defendant's sentence on appeal consistently with the Double Jeopardy Clause. The American Bar Association endorsed this result at the meeting of the House of Delegates in Chicago on February 4, 1980. *See* Resolution 119, American Bar Association, House of Delegates, *printed in* American Bar Association, *1980 Midyear Meeting Reports With Recommendations To The House Of Delegates* (1980).

A number of courts have taken the position that the double jeopardy bar attaches once the defendant has begun to serve the sentence that the

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But the Court need not reach this conclusion in this case to hold for petitioner. At the very least, the double jeopardy safeguard against multiple punishments must be triggered where, as here, a valid sentence has become final on direct review. If this were a civil litigation with the various counts of the indictment treated as different claims,[42] it would be absolutely clear that the case could not be remanded for plenary consideration of requests to modify Counts 6 and 7. The same result must obtain here.

This Court has always taken the position that the Double Jeopardy Clause, if anything, secures to defendants *greater* protection than they would enjoy in civil litigation.[43] LaRocca's interest in finality cannot, consistently with this tradition, be entitled to less protection than it would be accorded in a civil suit. Moreover, any other rule would expose defendants to an unconscionable disadvantage: While the government would be free to seek resentencing on

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government seeks to have increased. *See, e.g., United States v. Turner, supra.* However, if this rule is intended to preclude the attachment of jeopardy before the defendant has started serving his sentence, it seems contrary to *In re Bradley, supra.* There the trial court offered to return a fine paid by the defendant, thereby rendering the original punishment unexecuted. Nonetheless, this Court disallowed the subsequent increase in punishment. *See* note 38, *supra.* Even the government makes no attempt to support the commencement-of-sentence distinction.

[42]*See, e.g., FTC v. Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206 (1952).

[43]*See, e.g., United States v. Scott, supra,* 437 U.S. at 92; *United States v. Wilson,* 420 U.S. 332, 351-52 (1975).

In *Wilson* the Court specifically rejected Mr. Justice Holmes' view that "the first jeopardy should be treated as continuing until both sides [as in civil litigation] have exhausted their appeals on claimed errors of law, regardless of the possibility that the defendant may be subjected to retrial after a verdict of acquittal." 420 U.S. at 352.

otherwise final counts, the defendant would be precluded from presenting to the appellate court claims of error in these same convictions that he had decided, for whatever reason, not to raise on appeal.[44] Such a breach of mutuality would be fundamentally unfair.[45]

The gaping hole that the government's resentencing proposal would tear in established principles of finality underscores the flaw in its theory. There is simply nothing in the theory that would ever toll the government's resentencing prerogative. Jeopardy would never attach at all — not after judgment has been entered, not after the sentence has become final on direct review, and, so far as appears, not even after the sentence has been served. Resentencing would be permissible even years later — as where, for instance, a defendant ultimately succeeds in overturning one of several related convictions on collateral attack. The government's views thus give no effect whatever to the finality principles that lie at the core of the Double Jeopardy Clause (*see* note 40, *supra*), and would turn that "vital," "dearly won" guarantee into an empty formalism. *Green v. United States,* 355 U.S. 184, 198 (1957).[46]

[44]Here, for example, in seeking review in this Court, LaRocca relinquished several issues affecting the validity of Counts 6 and 7 that he had raised in the court of appeals. *See* Br. for Appellant LaRocca, 3d Cir. No. 77-1376.

[45]The analogy to civil litigation by itself disposes of the government's reliance (at 61-66) on *North Carolina v. Pearce, supra; United States v. Tateo,* 377 U.S. 463 (1964); *Bozza v. United States,* 330 U.S. 160 (1947); and *United States v. Scott, supra.* The questions raised in those cases (*i.e.,* the defendant's rights to avoid retrial after the dismissal of charges, to rely on a judgment illegally entered, and to avoid a new trial after the reversal or setting aside of his conviction) concerned the extent to which the Double Jeopardy Clause affords protections greater than the defendant would have in civil litigation. The fact that the Court answered these questions in these cases favorably to the government

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In sum, the government's resentencing request is barred at the threshold because of the government's failure to file a cross-petition. If the request, nonetheless, is considered, it should be rejected. Federal Criminal Rule 35, the Due Process Clause, and the Double Jeopardy Clause all foreclose resentencing here.

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hardly means that defendants have less security than ordinary finality principles would guarantee in the civil context.

[46]The government suggests (at 61-62) that by appealing one conviction the defendant has subjected himself to continuing — indeed, indefinite — jeopardy on other convictions, but this does not save the government's theory. *Green v. United States, supra,* 355 U.S. at 193-94, settles that "[c]onditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." By seeking review in this Court of his Section 924(c) conviction, LaRocca did not voluntarily or knowingly expose himself to the risk that, if successful, he would be subjected to the absolutely novel peril of more severe sentences on his separate, and unchallenged, Section 111 convictions. *See also Burks v. United States,* 437 U.S. 1, 15 & n.9 (1978); *Benton v. Maryland,* 395 U.S. 784, 796-97 (opinion for the Court), 811-12 (opinion of Harlan, J., dissenting) (1969).

CONCLUSION

For the foregoing reasons, the judgment on rehearing of the court of appeals should be reversed, and the case remanded with instructions to vacate the conviction and sentence against petitioner under Count 19, without re-sentencing him on Counts 6 and 7.

Respectfully submitted,

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